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In the Supreme Court of the United States

OCTOBER TERM, 1977

WALTER WOLAK, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The order of the court of appeals (Pet. App. A1) is not reported. The memorandum opinion of the district court (Pet. App. A2-A4) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 1978. The petition for a writ of certiorari was filed on February 23, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a writ of *habeas corpus ad prosequendum* issued by a federal court to state authorities, directing the production of a state prisoner for trial on federal criminal

charges, constitutes a "detainer" and a "written request for custody" making applicable the terms and conditions of the Interstate Agreement on Detainers Act.

2. Whether petitioner, who entered a guilty plea to charges in a superseding indictment, may raise his claim under the Agreement for the first time in a motion to vacate sentence under 28 U.S.C. 2255.

STATUTES INVOLVED

1. Section 2 of the Interstate Agreement on Detainers Act, 84 Stat. 1397-1402, 18 U.S.C. App., pp. 1395-1398, provides in pertinent part:

Article II

As used in this agreement:

(a) "State" shall mean a State of the United States; the United States of America * * *

* * * * *

Article IV

(a) The appropriate officer of the jurisdiction in which an untried indictment, information, or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party State made available in accordance with article V(a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the State in which the prisoner is incarcerated: * * * *And provided further,* That there shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the Governor of the sending State may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

* * * * *

(e) If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V(e) hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

* * * * *

Article V

(a) In response to a request made under article III or article IV hereof, the appropriate authority in a sending State shall offer to deliver temporary custody of such prisoner to the appropriate authority in the State where such indictment, information, or complaint is pending against such person in order that speedy and efficient prosecution may be had. * * *

* * * * *

2. 28 U.S.C. 2241 provides in pertinent part:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.* * *

* * * * *

(c) The writ of habeas corpus shall not extend to a prisoner unless—

* * * * *

(5) It is necessary to bring him into court to testify or for trial.

* * * * *

STATEMENT

1. In an indictment (No. 48565) filed in the United States District Court for the Eastern District of Michigan, petitioner was originally charged with possession and sale of heroin and conspiracy to possess and sell heroin, in violation of 21 U.S.C. 841(a)(1) and 846. On April 19, 1973, pursuant to a writ of *habeas corpus ad prosequendum* issued by the district court, petitioner was removed from a Michigan prison, where he was serving a sentence on a state offense, and produced before the court for arraignment on the federal indictment. At arraignment the court entered a plea of not guilty for petitioner, and he was returned to the state institution on the following day (Pet. App. A2, A8).

On June 27, 1973, petitioner was again brought from state prison pursuant to a writ of *habeas corpus ad prosequendum* and produced before the district court for trial (Pet. App. A12-A17). The trial was adjourned until August 28, 1973, however, and petitioner was returned to state prison on July 6, 1973 (*id.* at A2, A15). On August 7, 1973, petitioner pleaded guilty to one count of the indictment (*id.* at A2). On October 16, 1973, he was sentenced to five years' imprisonment to be followed by three years' special parole (Pet. 3).

2. Petitioner thereafter moved to vacate his sentence under 28 U.S.C. 2255 on the ground that he had not been informed, prior to pleading guilty, that a special parole term would be imposed in addition to any custodial sentence.[1] The district court denied the motion. The court of appeals reversed, however, and remanded the case to

[1]Petitioner did not assert any violation of the Interstate Agreement on Detainers in this motion.

the district court with instructions to vacate petitioner's sentence and to permit petitioner to replead. 510 F. 2d 164.

After the remand, a superseding indictment (No. 5-80909) was filed against petitioner, charging him with possession of heroin with intent to distribute it and with conspiracy (21 U.S.C. 841(a)(1) and 846) (Pet. 3)). Petitioner pleaded guilty to the possession count of the superseding indictment on March 4, 1976; he was sentenced (*nunc pro tunc* as of October 16, 1973, the date of his initial sentence) to the same term imposed after his original guilty plea (*ibid.*).

3. On February 14, 1976, petitioner moved, pursuant to 28 U.S.C. 2255, to vacate his second sentence, arguing for the first time that his original indictment should have been dismissed with prejudice because he had been returned from federal to state custody following his arraignment on that indictment without having first been tried on the federal charges, in alleged violation of Article IV(e) of the Interstate Agreement on Detainers Act (the "Agreement") (Pet. 3; Pet. App. A2-A3).[2] Article IV(e) provides for dismissal of charges in a receiving state unless a prisoner obtained from another jurisdiction pursuant to the Agreement is tried before his return to the sending state.[3] The district court denied the motion to vacate, concluding that petitioner had waived his non-jurisdictional claim under the Agreement by pleading guilty to the indictment (*id.* at A2-A4).

[2]Petitioner has never alleged any violation of the Agreement with respect to the proceedings under the superseding indictment.

[3]Both the United States and Michigan had joined the Agreement prior to the relevant events of this case. Interstate Agreement on Detainers Act, Sections 2-8, 84 Stat. 1397-1403, 18 U.S.C. App., pp. 1395-1398; Mich. Comp. Laws §§780.601 - 780-608 (1961).

The court of appeals affirmed. Stating that a writ of *habeas corpus ad prosequendum* is not a "detainer" under the Agreement, the court held that the terms of the Agreement did not govern petitioner's production before the district court pursuant to the *ad prosequendum* writ (Pet. App. A1).

ARGUMENT

1. The principal question presented in this case—whether the Agreement governs the transfer of a state inmate from state prison to federal court pursuant to a federal writ of *habeas corpus ad prosequendum* where no pre-existing "detainer" has been lodged against the inmate—is the same question presented in *United States* v. *Mauro*, No. 76-1596, argued February 27, 1978.[4] For the reasons stated in our brief and upon the argument in *Mauro*,[5] we believe that Article IV of the Agreement is inapplicable to transfers of state prisoners by federal writs of *habeas corpus ad prosequendum*, particularly where, as here, no detainer against the inmate has previously been filed with state prison authorities. Accordingly, if this Court reverses the decision of the court of appeals in *Mauro*, it should deny the instant petition.

2. Even if this Court were to affirm the decision in *Mauro*, however, we submit that the present petition nevertheless should be denied. Petitioner neither went to

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[4]Several petitions for writs of certiorari raising similar questions are also currently pending before this Court. See *Scallion* v. *United States*, No. 76-6559; *Kenaan* v. *United States*, No. 77-206; *Ridgeway* v. *United States*, No. 77-5252; *United States* v. *Ferro*, No. 77-326; *Randall* v. *United States*, No. 77-5582; *Cumberbatch* v. *United States*, No. 77-5590; *United States* v. *Sorrell* and *Thompson*, No. 77-593; *Chico and Colello* v. *United States*, No. 77-5706, *United States* v. *Labriola*, No. 77-1270.

[5]We are sending petitioner copies of our briefs in *Mauro* and *United States* v. *Ford*, No. 77-52, argued in tandem with *Mauro*.

trial nor took an appeal from his conviction, and his claim under the Agreement is deemed to have been waived by the entry and acceptance of his valid guilty plea. See *United States* v. *Palmer*, C.A. 3, No. 77-103, decided March 22, 1978; *United States* v. *Hill*, 564 F. 2d 1179 (C.A. 5); *Strawderman* v. *United States*, 436 F. Supp. 503 (E.D. Va.). See generally, *Tollett* v. *Henderson*, 411 U.S. 258; *Sunal* v. *Large*, 332 U.S. 174. Furthermore, we submit that, as the Second Circuit has concluded (*Edwards* v. *United States*, 564 F. 2d 652), such claims under the Agreement are not the sort of extraordinary claims that would support a grant of collateral relief under 28 U.S.C. 2255. See also *United States* v. *Chico*, 558 F. 2d 1047 (C.A. 2), petition for a writ of certiorari pending, No. 77-5706; Cf. *Davis* v. *United States*, 417 U.S. 333. Thus, even if petitioner were correct on the merits, he is not entitled to relief at this late stage.[6]

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[6]We further note that petitioner has not complained of any violations of the Agreement with respect to the superseding indictment. If this Court were to reject our other submissions and conclude that the original indictment should have been dismissed with prejudice, it should remand to the court of appeals to determine the effect of such a dismissal on the charges in the superseding indictment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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* The Solicitor General is disqualified in this case.

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